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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

State of Arizona, *ex rel.* Kristin K. Mayes,
Attorney General; et al.,

Plaintiffs,

v.

Michael D. Lansky, L.L.C., dba Avid Telecom;
et al.,

Defendants.

NO. CV-23-00233-TUC-CKJ

**PLAINTIFFS' MOTION TO
STRIKE OR IGNORE
DEFENDANTS' SUPPLEMENT
TO DEFENDANTS' MOTION
TO DISMISS OR, IN THE
ALTERNATIVE, FOR LEAVE
TO FILE A RESPONSE**

Plaintiffs respectfully file this Motion to Strike or Ignore Defendants' Michael D. Lansky, L.L.C, dba Avid Telecom ("Avid Telecom"), Michael D. Lansky ("Lansky"), and Stacey S. Reeves ("Reeves") (collectively, "Defendants") Supplement to Defendants' Motion to Dismiss ("Supplement"). [Dkt 62]. For the reasons set forth below, the Court should strike the Supplement, ignore it, or, in the alternative, allow Plaintiffs' request for leave to file the proposed response (Attachment A).

The Court Should Strike the Supplement

Pursuant to Local Rule 7.2(m), the Court should strike the entire Supplement. [Dkt 62].

Under Local Rule 7.2(m), a “motion to strike may be filed only if it is authorized by statute or rule, such as Federal Rules of Civil Procedure 12(f), 26(g)(2) or 37(b)(2)(A)(iii), or if it seeks to strike any part of a filing or submission on the ground that it is prohibited (or not authorized) by a statute, rule, or court order.”

First, Defendants’ Supplement was filed in violation of this Court’s Order setting a deadline of twenty-one days after entry of the Order, to wit October 5, 2023, to defend this case. [Dkt 24]. Defendants’ attempt to add new material to their Motion to Dismiss is untimely. Here, Defendants did not seek leave or demonstrate good cause to file an untimely motion raising new legal argument that corporate officers cannot be held personally liable for violations of the TCPA. [Dkt 62]. Thus, the filing was prohibited by Fed. R. Civ. P. 6(b), and the filing should be struck. *See* LRCiv 7.2(m).

Even if Defendants’ Supplement is construed as a reply brief, it should still be struck, both as untimely under this Court’s Order setting a deadline to reply by November 23, 2023, [Dkt 44], and because it improperly raises new arguments. “The Ninth Circuit has consistently held that where new arguments and new evidence is submitted for the first time in a reply brief, the arguments and evidence may be stricken.” *MJG Enterprises, Inc. v. Cloyd*, No. CV-10-0086-PHX-MHM, 2010 WL 3842222, at *6 n.1 (D. Ariz. Sept. 27, 2010) (citing *Cedano–Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003); *United States v. Wright*, 215 F.3d 1020, 1030 n.3 (9th Cir. 2000); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)).

Defendants are attempting to style their filing as a supplement on an existing legal argument. However, Defendants’ Supplement amounts to a new argument under Civ. Rule 12(b)(6), asserting that Defendants Lansky and Reeves, as corporate officers, cannot be held personally liable for their actions and their company’s actions that were in violation of the Telephone Consumer Protection Act (“TCPA”). [Dkt 63 at 2]. Defendants’ Motion

to Dismiss included an argument that Plaintiffs failed to plead sufficient material facts to hold Defendant Lansky liable under a theory of piercing of the corporate veil. [Dkt 29 at 13-15]. However, Defendants did not argue that there is no theory of liability under the TCPA to hold a corporate officer personally liable for the officer's or the company's violations of the TCPA. Thus, Defendants are making a new argument in this supplemental pleading without first requesting leave to do so. As such, the Court should strike it. *See MJG Enterprises, Inc. v. Cloyd*, No. CV-10-0086-PHX-MHM, 2010 WL 3842222, at *6 n.1 (D. Ariz. Sept. 27, 2010) (citing *Cedano–Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003); *United States v. Wright*, 215 F.3d 1020, 1030 n.3 (9th Cir. 2000); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)).

Further, Defendants' Supplement is based on previously known and available Third Circuit precedent. *See City Select Auto Sales, Inc.*, 885 F.3d 154, 160 (3d Cir. 2018), *KHS Corp. v. Singer Fin. Corp.*, 376 F.Supp.3d 524, 530 (E.D. Pa. 2019). Defendants had Third Circuit precedent available to them at the time that they filed their Motion to Dismiss, and Defendants chose not to cite to it. [Dkt. 29]. Now, Defendants are attempting to put forth an argument that was available to them when their Motion to Dismiss was filed based on a 2024 opinion in *Perrong v. Chase Data*, 2024 WL 329933 (E.D. Pa. Jan 26, 2024). However, *Perrong* only applies and restates existing Third Circuit precedent and does not articulate a new principle that did not exist at the time of the filing of Defendants' Motion to Dismiss.

The Court Can and Should Ignore the Supplement

If the Court does not strike the Supplement, the Court can and should just ignore the filing. “[T]here is a quick, simple, and cost-free alternative to striking an irrelevant pleading—ignoring it.” *Wells Fargo Bank NA v. Wyo Tech Inv. Grp. LLC*, No. CV-17-04140-PHX-DWL, 2019 WL 4736775, at *2 (D. Ariz. Sept. 27, 2019) (citing *Cf. AIRFX.com v. AirFX LLC*, 2012 WL 129804, *1 (D. Ariz. 2012) (“Defendant moves to strike plaintiffs' reply ..., arguing that the reply raises new arguments.... [A] motion to strike in this case is unnecessary, as we do not consider new arguments raised in a reply.”)).

Here, the Court can simply ignore Defendants' filing, as it is a new argument, especially since it was available to Defendants when the Motion to Dismiss was filed.

**In the Alternative, the Court Should Permit Plaintiffs to Respond
to Defendants' Supplement**

"A sur-reply is appropriate when a party raises new issues or new evidence in a reply brief." *ML Liquidating Trust v. Mayer Hoffman McCann P.C.*, 2011 WL 10451619, at *1 (D. Ariz. Mar. 11, 2011). If the Court permits Defendants' filing of the Supplement, Plaintiffs request an opportunity to respond. Plaintiffs are attaching a proposed response to the Supplement.

Conclusion

The Court should strike Defendants' Supplement. [Dkt 62]. In the alternative, the Court should either ignore the filing, or allow Plaintiffs to file a response to the Supplement.

RESPECTFULLY SUBMITTED DATED this 19th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2024, I caused the foregoing, PLAINTIFFS' MOTION TO STRIKE OR IGNORE DEFENDANTS' SUPPLEMENT TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE A RESPONSE to be filed and served electronically via the Court's CM/ECF system upon counsel of record.

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